Supreme Court, U.S.
FILED
AUG - 5 2016
OFFICE OF THE CLERK

No. 15-777

In the Supreme Court of the United States

SAMSUNG ELECTRONICS CO., LTD.,
SAMSUNG ELECTRONICS AMERICA, INC., AND
SAMSUNG TELECOMMUNICATIONS AMERICA, LLC,
Petitioners,

v.

APPLE INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* CROCS, INC. IN SUPPORT OF AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Crocs, Inc. ("Crocs") is a publicly-traded company based in Niwot, Colorado. A world leader in innovative casual footwear, Crocs will celebrate its 15th anniversary next year. Crocs has sold more than 300 million pairs of shoes in more than 65 countries around the world, and its annual sales now exceed $1 billion. Crocs employs over 2,500 workers in this country alone, and is at the forefront of research and development of new technologies related to foam molded footwear and footwear in general.

Crocs respectfully submits this brief to explain why Petitioners' asserted interpretation of 35 U.S.C. § 289 is incorrect, and to describe the severe negative consequences Petitioners' position would have for numerous industries that rely on innovative designs and the corresponding protections afforded by the total-profits remedy of Section 289. In particular, Crocs wishes to bring to the Court's attention the importance of allowing recovery of a design patent infringer's total profit—without apportionment—to industries and companies outside of the smartphone context from which the present case arises.

From its very inception, Crocs has devoted substantial resources to researching, developing, and bringing to market innovative and iconic footwear designs. Indeed, Crocs' designs are almost one and the same with its brand: Consumers see a molded clog

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[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus* and its counsel has made a monetary contribution to the preparation or submission of this brief. All parties consent to its filing.

embodying the patented Crocs design and immediately recognize it as (a) having aesthetic value and (b) originating from Crocs. In order to consistently ensure that its products are attractive to the consumer, Crocs employs or contracts with dozens of industrial designers and other research and development personnel worldwide. These are trained artisans who specialize in the aesthetic—how to vary the shape, appearance, or surface treatment of an article of manufacture to make it more visually appealing. This is in addition to the people who specialize in molding or manufacturing the product, as well as the people who specialize in how to market or sell the product.

For example, one of Crocs' most well-known and celebrated designs is for the Crocs Classic Clog:

This Crocs Classic Clog has been recognized throughout the world as reflecting one of the most iconic and recognizable footwear designs in history. In 2008, Footwear News named this design as one of the top "Icons in the Making." Footwear News, vol. 64, no. 18 (May 12, 2008), at 15. In 2009, the design was described in *Fifty Shoes That Changed the World*, a book listing the fifty shoes that made the most substantial impact in the world of British design in the

preceding 150 years. Design Museum, *Fifty Shoes That Changed the World* 86-87 (2009). In 2014, the Classic Clog was ranked third among the "Bestselling and Most-Wished-For Shoes." Debora Borchardt, *The Bestselling and Most-Wished-For-Shoes*, TheStreet (June 21, 2014), https://www.thestreet.com/story/12751848/3/the-bestselling-and-most-wished-for-shoes.html. And still today, it is listed as the #1 Best Seller among all shoes on Amazon.com. *See Amazon Best Sellers*, Amazon.com, *https://www.amazon.com/best-sellers-shoes/zgbs/shoes/ ref=zg_bs_nav_0* (last visited July 27, 2016).

Crocs' substantial and continued investment in design has been instrumental to Crocs' success, its growth as a company and employer, and its ability to offer consumers with innovative and diverse styles, choices, and means of expression. As a result of its pioneering designs, in 2012, Crocs was named the National Retail Federation's Retail Innovator Brand of the Year, and in 2013, Crocs won the Consumer Goods Technology Most Innovative Company Award.

Crocs now releases several hundred new styles each season. The *primary* differentiator between these styles often is not the function of the article or the method of manufacture, but instead the ornamental or aesthetic design of the article. When an infringer chooses to copy a Crocs product, it is clear exactly which style or design (from among hundreds) the infringer intended to copy. For this reason, Crocs recognized early on that design patents would be essential to protecting its innovative designs and intellectual property. Crocs now owns over 100 active U.S. design patents and design patent applications, as

well as over 700 active international industrial design applications or registrations.

Integral to design patent protection—indeed, the mechanism by which design patents protect innovation, deter infringers, encourage investment in the ornamental arts, and benefit consumers and the public—is the total-profits remedy codified in 35 U.S.C. § 289. There are myriad substantial and traditional industries, like the multi-billion-dollar footwear industry in which Crocs operates, that depend on Section 289's strong remedy and deterrent effect—protections that were specifically put in place by Congress for policy reasons that remain at least as applicable, if not more so, today as they did over 125 years ago. Requiring a showing of apportionment would not only violate the text, Congressional intent, and precedent applying Section 289, but would undermine the very protections that Congress sought to implement and maintain through numerous revisions to the patent laws, protections that continue to encourage innovation in design and drive sales across industries. Such a sea change would severely harm Crocs' ability to create, protect, and share its innovative designs. Crocs thus respectfully submits this brief to urge affirmance of the decision below.

SUMMARY OF ARGUMENT

The text, legislative history, and judicial application of 35 U.S.C. § 289 are clear—an infringer of a design patent is liable to the patent owner for the infringer's total profit. The availability of this remedy is no accident. It was a deliberate decision by Congress over 125 years ago to address the intractable problems of apportionment in the design patent context, which Congress believed left design patentees without an effective remedy against infringement. And in enacting the statute, Congress did not exclude "multi-component" or other such products. Nor did Congress confine the remedy to carpets, oilcloths and wallpaper. Rather, Congress drafted the statute to apply to "*any* article of manufacture," and has left this basic framework undisturbed through multiple amendments. If Section 289 needs updating to account for technological advances, such a change must come from Congress, not this esteemed Court.

Such a change, however, is not needed and not warranted. Section 289 continues to further its original policy goals, which encourage investment in the decorative arts, protect designers' innovations, and deter copying, especially in multi-billion-dollar industries like footwear and apparel. Indeed, while Petitioners and their *amici* focus on smartphones, Crocs submits this brief to make clear that Section 289 plays a critical role in long-standing and traditional industries outside of this sector, and that any change to the total-profits remedy would have drastic consequences for these industries.

Simply put, for companies in industries such as footwear, apparel, accessories, and appliances (to name

a few), design can be paramount—a chief differentiator in the market, a driver of sales, and the lifeblood of the business. These companies thus invest substantially in design, and in doing so provide the public with new and unique innovations and choices, as exemplified by such products as the Crocs' Classic Clog. At the same time, these companies face omnipresent threats from copyists and knock-off artists, who seek to profit from these companies' labor and undercut them in the market. These threats have only gotten more severe in the modern age, with the advent of technology that enables near- instantaneous copying on an industrial scale. Accordingly, Crocs and other companies rely on the enforcement framework currently provided by the design patent system, including Section 289, to protect their innovations.

Eliminating the total-profits remedy of Section 289 as Petitioners urge would severely and negatively impact Crocs and numerous other companies within these industries. It would remove a necessary deterrent against copyists, impede designers from obtaining any meaningful remedy by ushering back in the insoluble burden of apportionment, and discourage companies from investing in design, all to the detriment of the economy, consumers, and the public. On the other side of the coin, infringers would be able to copy designs with near impunity, knowing that they would at worst only have to surrender a portion of their profits as a cost of doing business. In short, the policy rationale for the total-profits remedy is at least as applicable today as it was in 1887, and strongly counsels against any change, which in any event would need to come from the legislature.

Faced with losing textual and policy-based arguments, Petitioners and their *amici* resort to far-flung hypotheticals to argue against the remedy that Congress specifically and unambiguously adopted. These imagined scenarios have little to no basis in fact, and serve to delegitimize the real-world impacts of copying on industries that rely on design. Moreover, Petitioners' parade of horribles ignores the unique nature of design patents, which makes hypotheticals such as innocent infringement of multiple design patents and the explosion of a design patent troll industry highly unlikely.

In sum, adopting Petitioners' interpretation of Section 289 would undermine a system that Congress specifically enacted and maintained for over a century, would hinder design and innovation at companies like Crocs, and would have drastic, widespread consequences for numerous industries outside of the smartphone sector. Crocs thus respectfully submits this brief to illustrate this reality, and to urge affirmance of the decision below.

ARGUMENT

I. SECTION 289 UNAMBIGUOUSLY PROVIDES FOR RECOVERY OF A DESIGN PATENT INFRINGER'S PROFITS, WITHOUT APPORTIONMENT

The text, legislative history, judicial interpretation, and academic commentary on Section 289 all confirm the Federal Circuit's holding below. This has been ably explained by Respondent (Resp. Br. at 28-35) and the Government (Gov. Br. at 11-15), and Crocs will not repeat those arguments here. Crocs provides the following brief points to address specific arguments advanced by Petitioners and their *amici*, particularly Petitioners' false dichotomy between smartphones and carpets, which ignores the text and intent of Section 289, as well as the numerous industries that have come to rely on its protections.

A. By Its Plain Text, Section 289 Applies To Any Article Of Manufacture, And Does Not Require Apportionment

The text of Section 289 is clear. It provides, in relevant part, that whoever applies a patented design to "*any* article of manufacture for the purpose of sale" or sells "*any* article of manufacture to which such design . . . has been applied," shall be liable to the patent owner "to the extent of his total profit." 35 U.S.C. § 289 (emphasis added). It does not say, "whoever applies a patented design to a *non-multicomponent* article of manufacture," or "whoever applies a patented design to *a single-article product*." Yet these are the fabricated limitations that Petitioners try to inject into the statutory text. (Pet. Br. 38, 41-42.)

Petitioners argue that Congress intended the total profits remedy to apply "at most" to "a holder of a design patent for a single-article product" (Pet. Br. at 38), and in fact suggest that Congress intended the remedy only to apply to "carpets, wall-papers, and oil cloths" (Pet. Br. at 41).[2] There is at least one insurmountable problem with this argument—Congress did not include any such limitations into the statute. And this Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

The statute also does not say that whoever applies a patented design to an article of manufacture for sale shall be liable for his total profit "attributable to infringement of the patented design" (Pet. Br. at 27-28) or "causally derived from the infringement" (Prof. Br. at 10). Congress instead stated that the liability would be "to the extent of [the infringer's] total profit," and that there would not be double recovery of the "profit made from the infringement." 35 U.S.C. § 289. As

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[2] The statements from the legislative history relied upon by Petitioners themselves reflect that legislators did not view the total-profits remedy to be so cabined. *See* 18 Cong. Rec. 834 (1887) (statement of Rep. Martin) (referring to "designs for carpets, oil-cloth, wallpaper, &c" (emphasis added); *id.* at 835 (referring to design patents for "carpet, or oil-cloth, or wall-paper, *or anything of that kind*" (emphasis added)). At the time, there were numerous design patents on multi-component products outside of carpeting, oil-cloths, and wallpaper, of which Congress is presumed to have been aware. (Resp. Br. at 14-16.) And in any event, these isolated statements do not override the plain text of the statue, which contains no such limitations.

explained below, it is beyond dispute that in enacting the total-profits remedy, Congress intended to do away with the inherent problems of apportioning profits between the design and other aspects of the article bearing the design. That Congress would then proceed to inject an apportionment component into the very statute intended to remedy these problems—and would do so by using backhanded phrases such as "to the extent of" and "made from" instead of simply saying that it wanted apportionment—cannot be credibly entertained.

Petitioners' arguments are not only contrary to well-accepted principles of statutory interpretation, but in effect attempt to do something that is only within the purview of Congress—carve out "multicomponent products" or "complex products like smartphones"[3] from the ambit of Section 289. And they ask this to be done by eviscerating the total-profits remedy altogether. Petitioners' emphasis on smartphones is understandable because this is the technology at issue in this case. But Petitioners' simplified picture of the purported distinctions between smartphones and carpets ignores huge, multi-billion-dollar industries, like the footwear industry in which Crocs and hundreds of other companies operate,[4] that rely on the protections and deterrent effects of Section 289.

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[3] Pet. Br. at 25, 38.

[4] The U.S. Census Bureau estimates that in 2012, sales by shoe stores alone totaled over $30.7 billion. *See Industry Snapshot*, U.S. Census Bureau, http://thedataweb.rm. census.gov/TheDataWeb_HotReport2/econsnapshot/2012/snapshot.hrml?NAICS=4482 (last visited July 31, 2016).

Stripping the total-profits remedy from the statute *in toto* would devastate these industries, inhibit innovation in design, and have additional adverse consequences as discussed below. If the statute needs updating to exclude certain technologies or industries, that is for Congress to do, with input from stakeholders such as designers, manufacturers, and the public. But it cannot be done by a strained interpretation of the plain text of Section 289.

B. The Legislative History Of Section 289 Confirms That It Was Correctly Interpreted By The Court Below To Permit Recovery Of An Infringer's Total Profits

The legislative history of Section 289 makes one thing clear—the total-profits remedy was no accident. Congress was concerned by the "emergency" presented by apportionment of design patent damages as imposed in the *Dobson* cases, deliberated the issue, and passed the Design Patent Act of 1887, the precursor to Section 289, specifically to do away with apportionment. 18 Cong. Rec. 834 ("The bill meets this emergency and provides a new rule of recovery for design patents. . . . [I]t is expedient that the infringer's entire profit on the article should be recoverable . . . for it is not apportionable."); *see also* S. Rep. No. 206, 49th Cong., 1st Sess. 1-2 (1886) (noting that it had "been abundantly shown" that maintaining an apportionment requirement would "virtually repeal the design patent laws" because such proof could "never be furnished"); *Nike Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1441-42 (Fed. Cir. 1998) (explaining the legislative history of Section 289, including Congress's "removal of the need

to apportion the infringer's profits between the patented design and the article bearing the design" as a direct response to the *Dobson* cases).

And despite amending the patent laws several times with respect to remedies since the Act of 1887, Congress has not changed the availability of an infringer's total profits as a remedy for design patent infringement, indicating that it believes that the original rationales underlying this framework are still applicable. *See* Act of Feb. 18, 1922, 42 Stat. 392; Act of Aug. 1, 1946, 60 Stat. 778; Act of July 19, 1952, 66 Stat. 792.

Congress specifically chose the total-profits remedy, and it did so for good reason. The remedy has been in force for over 125 years without change or challenge, and many industries have come to rely on it. If this framework of design patent protection needs modification or updating, it is for Congress to do so.

C. Section 289 Has Been Consistently Interpreted By Courts, Academics, And Other Authorities To Permit Recovery Of An Infringer's Total Profits

Unsurprisingly given its plain text and legislative history, Section 289 has been consistently interpreted by lower courts as providing for an infringer's total profits—without apportionment—on the infringing article of manufacture. *See, e.g.*, *Schnadig Corp. v. Gaines Mfg. Co., Inc.*, 620 F.2d 1166, 1171 (6th Cir. 1980) (Section 289 "provides a single measure of relief applicable to all cases of design patent infringement," "assures that the profit to the wrongdoer is fully extracted," and "place[s] the patentee in the shoes of

the infringer"); *Untermeyer v. Freund*, 58 F. 205, 212 (2d Cir. 1893) ("The rule which congress declared for the computation of profits was the total profit from the manufacture or sale of the article to which the design was applied, as distinguished from the pre-existing rule of the profit which could be proved to be attributable to the design."); Resp. Br. at 39-41 (discussing cases cited by Petitioners).

So too have academics and other authorities construed the statute. *See, e.g.*, Mark A. Lemley, *A Rational System of Design Patent Remedies*, 17 Stan. Tech. L. Rev. 219, 223 (2013) ("By its terms, [Section 289] provides that design patent cases can no longer apportion damages. If you include the patented design, you must pay your entire profit to the plaintiff."); Michael Risch, *Functionality and Graphical User Interface Design Patents*, 17 Stan. Tech. L. Rev. 53, 60 (2013) ("[D]esign patents allow for much greater damages [than copyright]: all of the defendant's profits.")[5]

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[5] While certain *amici* for Petitioners now urge against this interpretation, their argument rests on purported "wise policy and the remainder of the patent statute." (Prof. Br. at 2.) But even if *amicis'* arguments regarding policy and the remainder of the statute were credited, these do not override the actual text of the statute, the plain meaning of which is confirmed by its legislative history, as explained above.

II. POLICY CONSIDERATIONS SUPPORT THE FEDERAL CIRCUIT'S INTERPRETATION OF SECTION 289, AS CONGRESS'S RATIONALE FOR THE TOTAL PROFITS REMEDY IS EVEN MORE APPLICABLE IN TODAY'S MODERN ECONOMY

Petitioners and their supporting *amici* make various policy-based arguments about why the law should be different. As Crocs explains below, policy considerations actually support the interpretation of Section 289 affirmed by the Federal Circuit below.

A. Design Is Critically Important To Numerous Industries, The Economy, And The Public

In advancing their policy arguments, Petitioners construct another false dichotomy—between ornamental innovations disclosed in design patents and technological inventions disclosed in utility patents. At the base of these arguments is the implicit assumption that the former is less worthy of protection. *See* Pet. Br. at 2, 47-48 (arguing that if the existing interpretation of Section 289 is upheld, companies and innovators would be encouraged to "divert research and development from useful technologies to ornamental designs," and "focus their energies on minor designs rather than groundbreaking technologies"). Putting aside the lack of support for these assertions, and that this value judgment is not for Petitioners to make, it also ignores the critical importance of design, not only to those industries that rely on design to drive sales and distinguish their products, but as a national and global economic engine and as an overall "meritorious service to the public." *Gorham Co. v. White*, 81 U.S. 511, 525 (1871).

Indeed, in many industries and for many products, it is *appearance and design* that matter, that drive sales, and that provide value to consumers and the public. As this Court stated almost a century and a half ago, "It is the appearance itself which attracts attention and calls out favor or dislike. It is the appearance itself, therefore, no matter by what agency caused, that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense." *Id.* at 525; *see also* 18 Cong. Rec. 834 ("[I]t is just that the entire profit on the article should be recoverable and by the patentee, for it is the design that sells the article, and so that makes it possible to realize any profit at all . . . .").

The critical importance of design has not changed. "Today's consumers . . .value a product's aesthetics and user experience as much as the technology and craftsmanship underlying the product's functionality." Janice M. Mueller & Daniel Harris Brean, *Overcoming the "Impossible Issue" of Nonobviousness in Design Patents*, 99 Ky. L.J. 419, 422 (2010-11). Accordingly, "[d]esign is becoming increasingly important in modern life.... In the crowded modern consumer culture, design is the only thing that differentiates one product from another in the marketplace." Susanna Monseau, *The Challenge of Protecting Industrial Design in a Global Economy*, 20 Tex. Intell. Prop. L.J. 495, 501 (2012) (internal quotation marks omitted).

Thus, "[i]t is no accident that the top global companies are also design leaders in their respective fields." *Id.* To be sure, there is a strong correlation between design and a company's economic performance. *See, e.g.*, Julie H. Hertenstein, Majorie B.

Platt & Robert W. Veryzer, *The Impact of Industrial Design Effectiveness on Corporate Financial Performance*, 22 J. Prod. Innov. Mgmt. 13 (2005) (describing "strong evidence that effective industrial design is associated with better financial performance"); Mueller & Brean, *supra*, at 422 ("[F]irms in the global marketplace are increasingly competing on the basis of innovative product design. Such firms are quantifiably outperforming their competitors who fail to grasp the value-added of design."); Peter H. Bloch, *Seeking the Ideal Form: Product Design and Consumer Response*, 59 J. Mktg. 16, 16 (1995) ("The physical form or design of a product is an unquestioned determinant of its marketplace success.").

In addition, strong design improves market efficiencies, provides benefits to consumers, and serves the public interest:

> Investment in product design furthers efficiency by serving customers' benefit in terms of both quality and the aesthetic appearance of the product. By furthering a product's aesthetic appearance, design makes a positive contribution to market efficiency because the product increases the consumer's aesthetic pleasure, aside from its utility. Furthering enjoyment by aesthetic products has a positive value, per se, which enhances public welfare, even if such investment might make the product more expensive.

Orit Fischman Afori, *Reconceptualizing Property in Designs*, 25 Cardozo Arts & Ent. L.J. 1105, 1111-12 (2008); *see also* Bloch, *supra*, at 16 ("A good design

attracts consumers to a product, communicates to them, and adds value to the product by increasing the quality of the usage experiences associated with it."). Indeed, as described above, Crocs' substantial and continued investment in design have not only garnered widespread acclaim, but have been instrumental to Crocs' success, its growth as a company and employer, and its ability to offer consumers with innovative and diverse styles, choices, and means of expression.

In short, it is hard to overstate the importance of encouraging and protecting design, especially in numerous bedrock industries outside of the smartphone sector, such as the footwear industry in which Crocs and hundreds of other companies big and small operate. *See, e.g.*, Nike Br. at 15-28.

B. Design Copying Is Rampant, Has Severe Repercussions For Numerous Industries And The Public, And Has Been Made Easier By Recent Technological Advancements

Unfortunately, a hallmark of design is the omnipresence of infringers—companies whose business model is to copy or "knock off" designs that innovators spend months or years developing. *See Peter Pan Fabrics, Inc. v. Acadia Co.*, 173 F. Supp. 292, 296 (S.D.N.Y. 1959) ("The well-known history of the struggle between 'copyists,' 'pirates,' 'freebooters,' and the design 'originators' in the textile and allied industries has been described extensively."). "[P]iracy forces a designer to compete with cheaper, more widely accessible versions of the designer's own creation. Further, a flood of poor quality knockoffs in the marketplace damages the designer's reputation and

diminishes the value of the original design." Katherine Felice, *Fashioning A Solution for Design Piracy: Considering Intellectual Property Law in the Global Context of Fast Fashion*, 39 Syracuse J. Int'l L. & Com. 219, 229 (2011).

To be sure, the ramifications of "knockoffs" to industry and the public are enormous, resulting in billions in lost sales, as well as erosion of secondary public benefits such as tax revenues and wages. *See, e.g.*, Elizabeth Ferrill & Tina Tanhehco, *Protecting the Material World: The Role of Design Patents in the Fashion Industry*, 12 N.C. J.L. & Tech. 251, 258-61 (2011). Some experts argue that knockoffs represent an even greater threat to the fashion world than counterfeit goods, "partly because knockoffs have become so widespread, and partly because they have the ability to harm designers in a real way – economically and creatively, by taking away the incentive to create original design." *Id.* at 256.

While Petitioners and their supporting *amici* argue that recent technological advances undermine the original rationale for awarding infringer's profits without apportionment, such advances actually further support the policy considerations for doing so. "Technology has only accelerated the ability of knockoff designers to view designs and reproduce them. Today, high-end designs from runway shows become available on the Internet as a matter of practice within twenty-four hours . . . . In the digital age, designers not only face the threat of knockoffs, but need to confront the possibility that the knockoffs are likely to hit the market well before their original work." *Id.* at 265-268; *see also* Felice, *supra*, at 226 (describing "the rapid

turnaround of modern copying," and how copyists can "deliver stores a knockoff months before the designer version" based on "a highly competitive network of factories using the latest technology to copy designer styles"). As a representative from Council of Fashion Designers of America testified before a House subcommittee in 2006, "Copying, years ago, would take anywhere from three to four months to a year or more. But as I said, all that changed with new technology.... Today, there are even software programs that develop patterns from 360 degree photographs taken at the runway shows. From those patterns, automated machines cut and then stitch perfect copies of a designer's work." *A Bill To Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intell. Prop.*, 109th Cong. 9, 11-12 (2006).[6]

As Crocs can attest, these omnipresent, crippling risks of copying are not theoretical—they are very real and present a continuous threat to designers. For example, as discussed above, one of Crocs' most iconic and popular footwear designs is for the Crocs Classic Clog. This design was the culmination of substantial investments of time and resources, and ultimately

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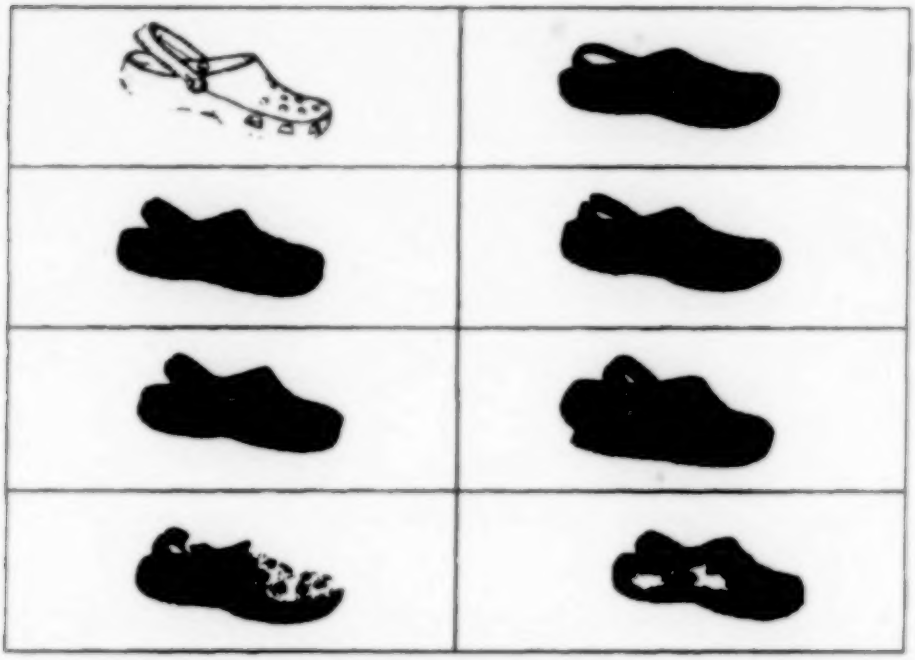
[6] Even Petitioners concede that Section 289 sprung from a concern "that designs for decorative items like carpets and wallpaper were uniquely susceptible to counterfeiting." (Pet. Br. at 41.) Unstated by Petitioners, however, is that this risk of counterfeiting is not limited to these items, but applies to designs across industries—from footwear to apparel to manufacturing—and has only been exacerbated by recent technological advancements. In any event, as discussed above in Part I, if other industries like smartphones are somehow distinct in this regard, that is for Congress to decide.

changed the landscape of casual footwear. However, with Crocs' success came an almost instantaneous flood of knockoffs. The chart below—with Crocs' design in the upper left—reflects just seven different infringing products:[7]



These knockoffs diluted Crocs' innovation, undercut its sales, and threatened its entire product line. Fortunately, Crocs had the protection of a design patent along with a utility patent to counter the tide of copyists. In 2006, Crocs filed infringement actions before the U.S. International Trade Commission ("ITC") and United States District Court for the District of Colorado against eleven of the most prolific U.S. infringers. Facing potential liability, several

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[7] *See Crocs, Inc. v. Int'l Trade Comm'n*, 598 F.3d 1294, 1299, 1304-06 (Fed. Cir. 2010)

defendants settled early and ceased their infringement, and the district court action was stayed pending the outcome of the ITC investigation. Ultimately, the Federal Circuit concluded that the ITC defendants infringed Crocs' patented design, and the ITC on remand issued a Final Commission Determination of Violation and General Exclusion Order in favor of Crocs. *See In re Certain Foam Footwear, U.S. Int'l Trade Comm'n*, No. 337-TA-567 (July 15, 2011). Without strong patent protection, it is likely that infringers would be openly selling direct Crocs knockoff products today, at a substantial loss to Crocs.

C. The Total-Profits Remedy Of Section 289 Is Necessary To Deter Copying, Remove The Intractable Burden Of Apportionment, And Encourage Investment In Design

Crocs' reliance on design patents is no accident. For over 170 years, Congress has sought to protect investments in design by establishing and maintaining a strong design patent system. As the Supreme Court stated over 140 years ago,

> The acts of Congress which authorize the grant of patents for designs were plainly intended to give encouragement to the decorative arts . . . The law manifestly contemplates that giving certain new and original appearances to a manufactured article may enhance its salable value, may enlarge the demand for it, and may be a meritorious service to the public. It therefore proposes to secure for a limited time to the ingenious producer of these appearances the advantages flowing from them.

Gorham, 81 U.S. at 524-25. This legislative mandate has been faithfully recognized and carried out ever since. From eating utensil handle designs, to microwave oven designs, to athletic shoe designs, to nail buffer designs, Congress and the courts have refined design patent law to promote innovation in light of continued technological advancement. *See id.*; *Litton Sys., Inc. v. Whirlpool Corp.*, 728 F.2d 1423 (Fed. Cir. 1984); *L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117 (Fed. Cir. 1993); *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665 (Fed. Cir. 2008).

Accordingly, "[a]lthough there is temptation to treat design patents as soft or minor patents, in many industries design patents can be used to protect a client's most valuable intellectual property." Scott D. Locke, *Fifth Avenue and the Patent Lawyer: Strategies for Using Design Patents to Increase the Value of Fashion and Luxury Goods Companies*, 5 J. Marshall Rev. Intell. Prop. L. 40, 53 (2005). "Design patents protect fundamentally different subject matter than that which is encompassed by a utility patent, and can be used to effectively and efficiently combat knock-off products that can be easily identified by visual inspection alone." *John Mezzalingua Assoc's, Inc. v. ITC*, 660 F.3d 1322, 1335 (Fed. Cir. 2011) (Reyna, J., dissenting); *see also* 18 Cong. Rec. 834 ("[Design patent laws create] a tendency to encourage the purchase of articles of standard qualities as opposed to shoddy imitations, which is a true economy in individuals and so in masses.").

This is especially true for the many industries that rely on appearance and design, such as footwear and apparel. *See* Ferrill & Tanhehco, *supra*, at 277-78

("While some academics may discount their value, design patents have been used to provide protection for products of the fashion industry, including shoes, handbags, belts, elements of outerwear, headgear, and eyeglass frames."); David R. Gerk, *Five Reasons Why 2008 Will Be A Year To Remember for Design Patents*, Intell. Prop. Today at 39 (April 2008) (noting the interest in design patent law by "an array of corporations known to be leaders in the electronics, footwear, apparel, appliance and various other industries that rely on design patents to protect their innovations from 'copycats' and 'knock-off artists'"). And it is certainly true for Crocs, whose iconic shoe designs have differentiated it from competitors, driven sales, and given Crocs a unique and important place in footwear design history. In short, for Crocs and many other companies, design patent protection is a core asset.

A fundamental and necessary component of design patent protection is the total-profits remedy provided by Section 289. As the former Director of the United States Patent and Trademark Office recently explained:

> Our laws and policies covering design patents play an important role in promoting and protecting that investment. Critically, *this includes requiring infringers to pay design patent holders for all damage caused, which discourages infringement and encourages the development of new and innovative designs* by providing innovators the opportunity to recover their costs without being undermined by free riders who have not made the same investment.

> Competitors must instead rely on differentiation and innovation to set themselves apart, further benefitting consumers.

David. J. Kappos, *America Doesn't Do Enough to Protect Its Innovative Designs*, Wired Magazine (Nov. 9, 2015), http://www.wired.com/2015/11/america-doesnt-do-enough-toprotect-its-innovative-designs/ (emphasis added).

Eliminating the total-profits remedy of Section 289, as Petitioners urge, would have drastic, widespread consequences. First, it would remove a critical deterrent against copyists and knockoff artists, ultimately crippling the numerous companies and industries that rely on design to differentiate their products. Second, it would impede designers from obtaining any meaningful remedy against copyists by ushering back in all the problems of apportionment that Congress deliberately did away with in 1887. Third, it would discourage companies from investing in design, to the detriment of the economy, consumers, and the public.

1. Altering the Total-Profits Remedy Would Eliminate the Necessary Deterrent Against Copying that Congress Specifically Enacted

The knockoff industry is extremely lucrative. For example, a 2011 study estimated the projected value of global trade in counterfeit and pirated goods in 2015 to rise to $1.77 trillion. *Counterfeiting Statistics*, International AntiCounterfeiting Coalition, http://www.iacc.org/resources/about/statistics (last visited July 31, 2016). And last year, the U.S.

Department of Homeland Security identified the total value of intellectual property related seizures in 2014 alone to be $250 billion. *Id.* Counting just knockoffs, the industry "is estimated to be $ 30 billion, with various hands wanting a piece of the pie." Ferrill & Tanhehco, *supra*, at 258-59. By definition, such profits can be had with little cost, as copyists do not have to invest in the research and development required to create innovative designs. *See* Felice, *supra*, at 229 ("An original designer invests considerable time and money into research, pattern making and fashion shows. A copyist simply steals the end product of the designer's investment and, by having a cost-free design, can sell the item at a lower price.").

Given the amount of profit to be had from copying, an extremely strong deterrent is required. As Congress recognized, the total-profits remedy of Section 289 is just such a deterrent. Faced with the prospect of losing *all* of its profits from the sale of an infringing product, a would-be infringer must think twice before copying. *See, e.g.*, Ferrill & Tanhehco, *supra*, at 293 ("[A] consistent policy of design patenting may be a valuable deterrent against knockoff designers, even without having to actually file a lawsuit."); *Nama-Stay: Lululemon Is Defending its Turf Through Design Patents*, 99 A.B.A.J. 9, at 10 (January 2013) (noting practitioner's opinion that design patents are "mostly used as a deterrent"). Once sued, this potential liability further incentivizes infringers to immediately cease and desist their infringing activities, which spares the design patentee from protracted and costly litigation.

Conversely, Petitioners' interpretation of Section 289 would eviscerate this critical deterrent. A system in which an infringer only faces a reasonable royalty, a portion of the patent owner's lost profits, or a portion of the infringer's total profits would not provide much of a deterrent, because an infringer could still profit from the infringement and chalk up any partial damages award as a cost of doing business.[8] There would simply be no incentive *not* to copy and try to profit from the designer's labor. Designers, in turn, would be forced to compete against their own designs and would be undercut in the market. As Congress recognized over a century ago, the more robust mechanism of Section 289 is needed, especially in numerous industries in which patented designs can be the lifeblood of a company.

2. Altering the Total-Profits Remedy Would Reintroduce the Problems of Apportionment that Congress Deliberately Removed for Design Patent Infringement

Removing the total-profits remedy of Section 289 would usher back in the same problems of apportionment that Congress sought to remedy with the Design Patent Act of 1887. "Apportionment presented particularly difficult problems of proof for design patentees, for the patentee was required to show what portion of the infringer's profit, or of his own lost profit, was due to the design and what portion was due to the article itself." *Nike*, 138 F.3d at 1441. As

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[8] *See* Pet. Br. at 53 ("[A] a reasonable royalty is rarely so large as to eliminate the infringer's entire profit.")

Congress recognized, requiring a design patentee to prove "what part of defendant's whole profit on the article made and sold was directly due to the *appearance* of those articles as distinguished from their material, their fabric, their utility, &c.," would "virtually repeal the design patent laws" because "the proof thus called for can never be furnished." S. Rep. No. 49-206, at 1-2.

The same holds true today. Requiring design patentees to apportion an infringer's profits on an infringing article based on appearance as opposed to other features would subject them to an impractical undertaking, effectively nullifying the benefits of design patent protection. At the very least, such a burden would impose patentees with substantial additional costs and delay, including the engagement of experts and other resources to determine causation and calculate damages. As a practical matter, and as Congress recognized, this would "virtually repeal the design patent laws."

3. Altering the Total-Profits Remedy Would Discourage Companies from Investing in Design, Ultimately Harming the Economy, Consumers, and the Public

For many companies, the decision to seek design patent protection is not taken lightly. The process can be expensive, long, and burdensome. Indeed, the requirements for obtaining design patents can present "insurmountable obstacles" for designers, and the "lengthy waiting period, coupled with the expense of preparing an application, discourages many designers from seeking patent protection." Katelyn Brandes,

Design Protection in the United States and European Union: Piracy's Detrimental Effects in the Digital World, 37 Brooklyn J. Int'l L. 1115, 1128 (2012); *see also* Susanna Monseau, *European Design Rights: A Model for the Protection of All Designers from Piracy*, 48 Am. Bus. L.J. 27, 42-44 (2011) (noting shortcomings of the design patent system, including that "as a practical matter, the design patent process is both lengthy and costly").

If companies must also face uncertainty as to whether they can receive adequate damages from enforcing their design patents, it likely will discourage companies from seeking such protection in the first place, and in turn discourage investment in design overall. Consumers would have less access to innovative designs and choices, and the economic benefits of a strong design industry would be lost. *See supra*, Part II.A. For companies such as Crocs for whom innovative designs are critical, such uncertainty would severely hamper innovation, investment, and profitability.

III. PETITIONERS' HYPOTHETICALS REST ON FAULTY ASSUMPTIONS AND DETRACT FROM THE REAL-WORLD PROBLEMS AMELIORATED BY SECTION 289

Petitioners offer a host of extreme hypotheticals that they argue "counsel interpreting Section 289" to require apportionment. (Pet. Br. at 44-53.) Petitioners paint a world in which innocent companies unknowingly incorporate multiple patented designs within the same product, while design patent trolls run amok. Even if these far-fetched, imagined scenarios could override the plain text and intent of Section 289

(and they cannot), there is a fundamental problem with Petitioners' speculations—they are not grounded in fact. As Respondent points out, Petitioners offer nothing but conjecture and questionable sources to support its unlikely parade of horribles. (Resp. Br. at 53-60.) The total profits remedy has been in place for over 125 years, with none of the adverse "practical consequences" advanced by Petitioners. Congress's decision to protect design through the total-profits remedy is working as intended, and there is no sound basis to change it.

Crocs raises this point because as creative as Petitioners' hypotheticals are, they present a serious risk of de-legitimizing the real-world ramifications of design patent infringement and the drastic consequences that would follow from eliminating the total-profits remedy of Section 289. Rather than conjecture, Crocs' firsthand experience underscores the omnipresent risks of design copying and the necessity of the strong deterrent of Section 289. And as discussed above, these issues are not limited to Crocs, but affect entire multi-billion-dollar industries, consumers, and the public. *See supra*, Part II.B. In the real world, there is far greater risk that an innovator's design will be copied, released into the market, and diluted, with all the attendant negative consequences, than there is that a company will accidentally infringe multiple design patents or that design patent trolls will hold companies hostage based on innocent use of patented designs.

This reality follows from the nature of design patents and the standard for design patent infringement. Unlike utility patents—which can

contain dozens or hundreds of broad and vague claims—a design patent may only contain a single claim, which must "be in formal terms to the ornamental design for the article (specifying name) as shown, or as shown and described." 37 CFR § 1.153. "No description, other than a reference to the drawing, is ordinarily required." *Id.*; *see also Crocs*, 598 F.3d at 1302-03 ("Design patents are typically claimed as shown in drawings. . . . [A]n illustration depicts a design better than it could be by any description and a description would probably not be intelligible without the illustration."). In addition, in order for a design to infringe, it must be found to be "substantially the same" as the patented design under the "ordinary observer" test. *Egyptian Goddess*, 543 F.3d at 670, 678.

Given these standards, it appears highly unlikely that an innocent company will accidentally incorporate multiple specific designs into a complex product such that each design may be deemed "substantially the same" as a patented design. If a policy choice is to be made, it should be to protect design innovators and the related affected stakeholders of a strong design patent system, rather than hypothetical actors whose multiple acts of infringement, if they were occur, would almost certainly be intentional. In fact, Congress made such a policy choice 129 years ago, and it is up to Congress to make any changes to it.[9]

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[9] As Respondent points out, any practical issues with allocating the total-profits remedy in such cases can be dealt with through a variety of established mechanisms, including interpleader and impleader. (Resp. Br. at 56.)

Similarly, the nature of design patents calls into question Petitioners' hypotheticals regarding patent trolling. A critical aspect of the patent troll business model is the broad claim language often found in issued utility patents, including claim language recited in functional terms. *See, e.g.*, Executive Office of the President, *Patent Assertion and U.S. Innovation* (June 2013) ("White House Report"), at 8 ("These broad, functionally-defined, and intertwined patents are therefore a key part of the PAE business model.").[10] Such overbroad claims allow patent trolls to assert patents against scores of diverse companies in the hopes of amassing quick and efficient settlements. *See id.* at 6 ("PAEs assert broad patent claims against an unusually large set of potential defendants; these assertions are often not based on any evidence of infringement by an individual defendant, but are instead an attempt to find companies that will seek to settle the PAE's claims rather than risk a trial."); Jeremiah Chan & Matthew Fawcett, *Footsteps of the Patent Troll*, 10 Intell. Prop. L. Bull. 1, 4 (2005) ("[O]verbroad claims allow patent trolls to cast a relatively wider net over a technology base and more easily assert infringement against a larger group of target companies."). The accused infringers, in turn, cannot easily design around the asserted claims given their breadth and vagueness. While the asserted infringement allegations are often baseless, the broad claim language allows patent trolls to minimize the risks of an adverse Rule 11 or exceptional case finding under 35 U.S.C. § 285, such that innocent defendants

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[10] The White House Report uses the term "PAE" or "Patent Assertion Entity" as synonymous with "patent troll." *See id.* at 3.

have few options other than pay a settlement or commit to costly and protracted litigation.

Conversely, the requirement that a design patentee show that an accused design is substantially the same as the design illustrated in the asserted patent makes the prospect of design patent trolling far less likely. It is much harder for a putative patent troll to use design patent claims as a lever against unwitting companies. Indeed, companies can always use substantially different designs on their products to "design around" a patented design, and the risk of ensnaring innocent infringers in the design patent context is low. (Resp. Br. at 58.) As Crocs well knows, design copying is generally intentional, and reflects a deliberate effort to appropriate the designs of innovators and undercut them in the market. In addition, design innovators such as Crocs—whose designs are often highly associated with their brand, serve as key differentiators in the market, and in many instances constitute the lifeblood of the company—are unlikely to sell or license their design patents to a patent assertion entity in exchange for a quick payout or royalty.

In short, Petitioners' hypotheticals are either unsupported or rest on flawed assumptions. They should not detract from the very real problems of copying, the necessity of the total-profits remedy to address these problems, and the ways in which Section 289 continues to encourage investment in design, protect designers, and ensure a fair market.

CONCLUSION

For the foregoing reasons, *amicus curiae* Crocs, Inc. respectfully urges that the Court affirm the decision below.

Respectfully submitted,

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